No. 11,119

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

HOUGHTON GIFFORD,
Appellant,

vs.

THE TRAVELERS PROTECTIVE ASSOCIATION OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

A. FACTS CONCERNING JURISDICTION OF THE FEDERAL COURT.

The complaint in this case was originally filed in the Superior Court of the State of California in and for the City and County of San Francisco. (Tr. p. 2.)

The defendant and appellee is a fraternal benefit society incorporated under the laws of the State of Missouri. It filed its petition for the removal of the case to the District Court of the United States for the Northern District of California. (Tr. p. 7.)

The petition for removal asserted that the plaintiff sought to recover from the defendant the sum of $5000.00, and the controversy was wholly between citizens of different states. Thereafter the Superior Court made its order

of removal (Tr. p. 7) and the certified copy of the record was in due course filed with the Clerk of the District Court. (Tr. p. 8.)

B. CONCISE STATEMENT OF THE CASE BY APPELLEE.

For purposes of brevity, the defendant appellee will be referred to hereafter as the Association.

1. The question involved on this appeal is whether a contract of insurance which shortens the statutory period of limitation is reasonable and valid when it provides that an action must be commenced "within six months after the refusal" of the defendant-appellee Association to pay the claim asserted, and when it further appears that the complaint in this case was, in fact, filed more than six months after the Association refused to pay plaintiff's claim.

2. The manner in which the aforesaid question was raised was as follows:

(a) The Association filed a motion for a summary judgment of dismissal under the authority of Rule 56b of the Rules of Civil Procedure. (Tr. p. 10.)

(b) In addition, the Association filed a motion to dismiss the complaint under the authority of Rule 12, subdivisions (a), (b) and (e) of the Rules of Civil Procedure. (Tr. p. 12, et seq.)

3. The District Court Judge granted the defendant's motion to dismiss plaintiff's complaint but at the same time granted plaintiff leave "to appropriately amend his complaint". (Tr. p. 26.)

The decision on the defendant's motion for a summary judgment was reserved until plaintiff had filed, if he was so disposed, an amended complaint. (Tr. p. 26.) However, the plaintiff did not avail himself of the right to file an amended complaint, and thereafter the District Court decreed that the defendant was entitled to a judgment dismissing plaintiff's complaint, and accordingly declared that the complaint was dismissed "upon the ground that there is no genuine issue as to any material fact and * * * that the alleged cause of action set forth in plaintiff's complaint has become barred and that the claim has lapsed by reason of the failure on the part of plaintiff to commence any action against the above named defendant * * * within six months after the refusal of the defendant to pay plaintiff's claim." (Tr. p. 28.)

The plaintiff is appealing from the aforesaid order of the District Court.

C. APPELLEE'S STATEMENT OF FACTS.

1. Facts alleged in the complaint.

The Association is a fraternal benefit society incorporated under the laws of the State of Missouri and transacting business in the State of California. (Tr. p. 2.)

On May 9, 1932, it issued a Class "A" certificate of membership to George Gifford under which it insured his life, if his death was caused by accidental means. (Tr. p. 3.) The proceeds of the certificate were payable to the plaintiff. The insured was a member of the Association in good standing when, on September 3, 1943, it is alleged he was "killed by accidental means". (Tr. p. 4.)

Plaintiff alleges he gave notice of death to the Association; demanded payment of $5000.00, and that the Association "refused" to make the payment. (Tr. p. 5.)

2. Facts alleged in affidavit supporting Association's motions.

Plaintiff's complaint referred to (Tr. p. 3) but did not disclose the terms of the certificate of membership issued to George Gifford. The affidavit, filed in support of defendant's motions, presented in the District Court (Tr. p. 18) included a verbatim copy of the certificate of membership (Tr. p. 21) in which it is provided in part:

> "This Certificate, the Constitution, By-Laws and Articles of Incorporation of said Association, and Application for Membership, signed by said member, and all amendments thereto shall constitute the agreement between said Association and said member, and shall govern the payment of benefits."

The affidavit further disclosed the provision in Article XII, Section 7, of the Constitution and By-Laws of the Association, which may be examined both in the affidavit (Tr. p. 20) and, also, in the Constitution and By-Laws (p. 44, lines 25 to 33) which are before the court in their original form pursuant to stipulation. (Tr. p. 44.)

The provision in question carries the heading "Limitations for Suits" and reads thus:

> "Sec. 7. *No action against this Association for the recovery on any claim arising under the Certificate of Membership or the Constitution and By-Laws shall be sustained unless commenced within six months after the refusal of this Association to pay the same and a lapse of such period shall be conclusive evidence*

against the validity of such claim asserted if an action for its enforcement be subsequently commenced.'' (Tr. p. 20.)

There is no averment in the complaint as to the date when plaintiff notified the Association of the death of the insured, nor as to the date when the Association refused payment of plaintiff's demand.

However, the Association's affidavit discloses that prior to December 21, 1943 (Tr. p. 19) plaintiff, as the beneficiary named in the certificate, presented his claim against the Association, and on December 21, 1943, the Association denied liability in writing, and informed plaintiff of its refusal to pay plaintiff's demand, and that the plaintiff received the Association's written refusal to pay on December 27, 1943. (Tr. p. 20.) The written denial of liability and refusal to pay plaintiff's demand is set forth on page 25 of the transcript and may also be found set out at length later in this brief.

The record further shows that no action was commenced by plaintiff until September 1, 1944 (Tr. p. 6) which was more than six months after the date of the Association's refusal to pay plaintiff's claim.

D. SUMMARY OF ARGUMENT.

1. A summary judgment is properly granted when it appears, either from the complaint or by affidavit filed by defendant, that the cause of action is barred by contract.

2. A contract of insurance, like other contracts, should be construed according to the sense and meaning of the terms which the parties have used.

3. An insurer may limit by contract the time within which suit may be brought on the policy so as to provide a shorter period of time than is provided by law, provided the interval is not unreasonable.

4. An insurance contract limitation of six months, after refusal to pay, is not unreasonable.

5. The delay by plaintiff in commencing his suit for a period beyond six months was in no way attributable to the Association, and the plaintiff does not charge in his complaint, nor did he indicate when he had the opportunity so to do, by amending his complaint, that the Association either expressly or impliedly urged plaintiff to delay for more than six months the commencement of his suit, after refusing to pay his claim.

6. Appellant's arguments are not supported by his citations of authorities which are inapplicable, in any event, to the facts in this case.

E. ARGUMENT.

1. A SUMMARY JUDGMENT IS PROPERLY GRANTED WHEN IT APPEARS EITHER FROM THE COMPLAINT OR AFFIDAVIT FILED BY THE ASSOCIATION THAT THE CAUSE OF ACTION IS BARRED BY CONTRACT.

The District Court was entitled to consider the Association's affidavit on its motion for a summary judgment. The rules clearly declare (56b) that, "a party against whom a claim * * * is asserted * * * may at any time move with or without supporting affidavits for a summary judgment in his favor * * *"

It is also declared in the rules (56c) that, "the judgment sought shall be rendered forthwith if the pleadings * * * admissions on file, together with affidavits * * * show that * * * there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law". (See judgment, Tr. p. 28, et seq.)

There are many instances in which motions for a summary judgment have been granted both with and without supporting affidavits.

Whiteman v. Federal Life Insurance Co. (W. D. Mo.). Department of Justice Bulletin 24 (this case involved an accident insurance policy);

Post v. Goethals, 104 Fed. (2d) 706;

Rabe v. Metropolitan Life (Mass., 1940), 1 F. R. D. 391;

Miller v. Hoffman (N. J., 1940), 1 F. R. D. 290, at page 291;

American Insurance Co. v. Gentile Bros. (Fifth Circuit, 1940), 109 Fed. (2d) 732;

Bicknell v. Lloyd Smith (Second Circuit, 1940), 109 Fed. (2d) 527;

Standard Rolling Mills v. National, etc. (N. Y., 1942), 2 F. R. D. 236;

Reynolds v. Needle (D. C., 1942), 132 Fed. (2d) 161;

Altman v. Curtis Wright (Second Circuit, 1940), 124 Fed. (2d) 177;

Sanders v. Nehi (Texas, 1939), 30 Fed. Supp. 332;

Bushwick v. Ford Motor (N. Y., 1940), 30 Fed. Supp. 917;

Viking Press v. Goldman (N. Y., 1941), 38 Fed. Supp. 1014;

Divine v. Levy (La., 1940), 36 Fed. Supp. 55;

Eberle v. Sinclair (Okla., 1940), 35 Fed. Supp. 890;

Kissick v. First National (Neb., 1942), 46 Fed. Supp. 869;

U. S. v. Maryland Casualty Co. (La., 1944), 54 Fed. Supp. 290;

Kithcart v. Metropolitan Life Ins. Co., 150 Fed. (2d) 997.

In *Alabama etc. v. Shell* (Ala., 1939), 38 Fed. Supp. 386, the Court, in considering the question as to whether facts appearing in affidavits, etc., may be considered in the disposition of a motion to dismiss, said:

> "We are of the opinion that the affidavits * * * and answers to interrogatories may be considered here on all the motions, the latter being within the terms of Rule 12-b, defenses in law and in fact."

A motion to dismiss a complaint which is supported by an affidavit is referred to as a "speaking" motion.

See:

Samara v. U. S. (Second Circuit, 1942), 129 Fed. (2d) 594 at page 597.

Motions to dismiss may be granted in all cases where it appears that the plaintiff has not stated and cannot state a claim upon which relief can be granted.

Keasby v. Martison (Pa., 1941), 1 F. R. D. 626;
Tahir Erk v. Glenn Martin, 116 Fed. (2d) 865;
Singer v. Union Pacific (Eighth Circuit, 1940), 109 Fed. (2d) 491.

See also:

Monroe v. Ordway, 103 Fed. (2d) 813;
Continental v. Ehrhart, 1 F. R. D. 199;
Roe v. Sears Roebuck, 132 Fed. (2d) 829, 832;
Sadler v. Guardian Life, etc., 40 Fed. Supp. 772;
Pen. Ken. etc. v. Warfield, 137 Fed. (2d) 871;
Johnston v. United States, 38 Fed. Supp. 544;
Hemler v. Union, etc., 40 Fed. Supp. 824;
Means v. McFadden, 25 Fed. Supp. 993.

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2. A CONTRACT OF INSURANCE, LIKE OTHER CONTRACTS, SHOULD BE CONSTRUED ACCORDING TO THE SENSE AND MEANING OF THE TERMS WHICH THE PARTIES HAVE USED, AND IF THEY ARE CLEAR AND UNAMBIGUOUS THEIR TERMS ARE TO BE TAKEN AND UNDERSTOOD IN THEIR PLAIN, ORDINARY AND POPULAR SENSE.

Imperial etc. Ins. Co. v. Coos County, 38 L. ed. 231;
Birss v. Order of United, etc., 109 Neb. 226;
Kingsley v. American, etc. Ins. Co., 259 Mich. 53;
Standard, etc. Co. v. McNulty (Eighth Circuit), 157 Fed. 224;
Delaware Ins. Co. v. Green, 120 Fed. 916;
Ginsburg v. Butler, 217 Cal. 467.

3. AN INSURER MAY LIMIT BY CONTRACT THE TIME WITHIN WHICH SUIT MAY BE BROUGHT ON THE POLICY SO AS TO PROVIDE A SHORTER PERIOD OF TIME THAN IS OTHERWISE PROVIDED FOR BY LAW SUBJECT, ONLY, TO THE CONDITION THAT THE INTERVAL IS NOT UNREASONABLE.

Genuser v. Ocean Acc. etc. Corp., 57 Cal. App. (2d) 979;

Penn. R.R. Co. v. Mid State, etc. Co., 21 Cal. (2d) 243;

Tebbets v. Fidelity and Casualty Co., 155 Cal. 138;

Bollinger v. National Fire Ins. Co. (1944), 23 A. C. 888;

Bennett v. Modern Woodmen, 52 Cal. App. 581;

Fageol T. & C. Co. v. Pacific Indemnity Co., 18 Cal. (2d) 748;

U. S. v. Curtis Aeroplane Co., 50 Fed. Supp. 477;

U. S. v. Fleisher Engineering & Constr. Co., 45 Fed. Supp. 781;

McCormick v. Woodmen of The World, 57 Cal. App. 568;

Schram v. Robertson (Ninth Circuit), 111 Fed. (2d) 722, 724;

Olds v. General Acc. Fire, 67 A. C. A. 946;

Beeson v. Schloss, 183 Cal. 618.

4. AN INSURANCE CONTRACT, CARRYING A LIMITATION OF SIX MONTHS, FOLLOWING A REFUSAL TO PAY, IS NOT AN UNREASONABLE PERIOD OF LIMITATION.

In *Tebbets v. Fidelity & Casualty Co., supra,* the policy provided that affirmative proof of death of the insured must be furnished the company within two months after its occurrence and that, "legal proceedings for recovery hereunder may not be brought before the expiry of three months from the date of filing proofs to the company's home office, nor at all, unless begun six months from the time of death".

A general demurrer was interposed to the complaint and was sustained. The Supreme Court of California ruled that the demurrer was properly sustained and declared that, "a condition in a policy of insurance, providing that no recovery shall be had thereon unless suit be brought within a given time, is valid if the time limited be in itself not unreasonable". And the Court further declared that, "the six months period is not in itself unreasonable", notwithstanding the fact that it began to run from the date of death; whereas, in the contract under consideration in this case, the time within which suit might be filed ran six months "after the refusal of this Association to pay", thus adding on to the period within which suit might be filed the interval between date of death and date of refusal to pay.

In the case at bar, death occurred on September 3, 1943. (Tr. p. 4.) The plaintiff received notice of the Association's refusal to pay on December 27, 1943. The six months contract of limitation did not begin to run on

September 3, 1943, but on December 27, 1943, and expired on June 27, 1944.

As already indicated, the complaint in this action was not filed until September 1, 1944. (Tr. p. 6.)

Under these facts, it is respectfully submitted that the six months period, provided for in the contract of insurance involved in this case, is not in itself unreasonable, and after a six months provision was sustained in the *Tebbets Case,* where it ran from date of death, for even greater reasons should it be sustained in this case where it runs from date of refusal of payment.

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5. **THE DELAY BY PLAINTIFF IN COMMENCING HIS SUIT WAS IN NO WAY ATTRIBUTABLE TO THE ASSOCIATION, AND THE ASSOCIATION DID NOT, EITHER EXPRESSLY OR IMPLIEDLY, URGE THE PLAINTIFF TO DELAY FOR MORE THAN SIX MONTHS THE COMMENCEMENT OF HIS SUIT AFTER REFUSING TO PAY HIS CLAIM.**

On December 21, 1943, the Association addressed a communication to the plaintiff acknowledging the receipt of the notice of the insured's death and proceeded to point out the basis upon which the Association refused to recognize liabilities. The letter reads as follows:

"December 21, 1943

Mr. Houghton Gifford
1390 Hugo Street

San Francisco (8), California.

In re: George Gifford, Deceased
No. 36827

Dear Sir:

Upon receipt of the notice of your father's death this Association, in accordance with the request made by your mother, investigated the facts in reference thereto.

This Association provides benefits for the beneficiaries of its members in those cases where death is due to external, violent and accidental means independently of all other causes. Liability is expressly excluded where death is caused wholly through any bodily or mental infirmity or disease. The conclusion reached by the pathologist who performed the autopsy is that your father's death was caused by 'Coronary sclerosis with occlusion and myocardial failure. Angioma of the brain. Pyelonephritis.' The official death certificate likewise discloses that death was 'Death due to natural causes.' Under the circumstances we regret to advise you that there is no liability on the part of the Association and it regrets that it cannot be of service to you.

Sincerely yours
The Travelers Protective
Association of America
(sgd.) By Theo C. Abele
Secretary

TCA:MPP:EPP"

There can be no question but that the foregoing letter was intended by the Association as a refusal to pay, for it unequivocally expressed its regret to advise the plaintiff that there was "no liability" on its part, and it further expressed its regret that it could not be of service to the plaintiff.

Furthermore, there can be no doubt but that the plaintiff interpreted the foregoing letter as the Association's refusal to make payment for, when he filed his complaint on September 1, 1944, he alleged in paragraph IV thereof (Tr. p. 5), that the defendant had refused payment.

At the time of the hearing of the defendant's motion for a summary judgment, and following the notice of the interlocutory order made by Judge Goodman (Tr. p. 26), the plaintiff failed to disclose by any amendment to his complaint or by any affidavit or otherwise any other act on the part of the Association which could be construed as a refusal to pay, other than the letter of December 21, 1943, which was admittedly received by the plaintiff on December 27, 1942. It is admitted in appellant's opening brief (p. 3) that the "plaintiff declined to amend his complaint". Plaintiff was given ample opportunity to amend his complaint, and, failing to avail himself thereof, it necessarily follows that there are no facts before this court, just as there were none before the District Court, which either expressly or impliedly place upon the Association any responsibility for plaintiff's delay in commencing the suit for a period of more than six months after the Association's refusal to pay.

Under these circumstances, the case at bar does not come within the rule of such cases as *Bollinger v. National*

Fire Insurance Co., 25 Cal. (2d) 399, where the insurance company, through its attorneys, indulged in a course of conduct which either tended to delay or induced the insured to delay the filing of his action.

In the case at bar, the plaintiff, by his own conduct, uninfluenced in any way by the Association, failed to bring the action within the contractual period of limitation.

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6. PLAINTIFF'S ARGUMENTS ARE NOT SUPPORTED BY HIS CITATIONS OF AUTHORITIES WHICH ARE INAPPLICABLE IN ANY EVENT TO THE FACTS IN THIS CASE.

(a) Appellant claims that the plaintiff "being a beneficiary and not a member of defendant Fraternal Society was not bound by section 7 of the Articles of Incorporation" etc. (See App. Op. Br. p. 9.) The contract between George Gifford and the Association may be considered as having been entered into for the benefit of Houghton Gifford. (Sec. 1559, Civil Code.) However, Houghton Gifford cannot claim the benefits of the contract without assuming its burdens and recognizing its terms, covenants and conditions. When the certificate of membership was issued and delivered to and accepted by George Gifford (Tr. p. 3) it was agreed (Tr. p. 21) that "this certificate, the constitution, by-laws and articles of incorporation of said association and application for membership signed by said member and all amendments thereto shall constitute the agreement between said association and said member and shall govern the payment of benefits * * * *and shall bind said member and his beneficiary or beneficiaries*".

The plaintiff cannot escape this unambiguous covenant on the part of George Gifford. The invocation and application of a contractual period of limitation does not involve the principle of forfeiture as suggested by counsel for appellant. (App. Op. Br. p. 9.) Respondent contends that plaintiff was bound by the contractual limitation of time as fixed in the constitution and by-laws. (Tr. p. 20.)

In *Ells v. Order of United States, etc.*, 20 Cal. (2d) 290, the membership certificate upon which the beneficiary relied did *not* contain any provisions expressly binding the beneficiary, such as there are in this case. (Tr. pp. 21 and 22.) Besides, the acts complained of by the insurance company in the *Ells* case were not performed by the beneficiary but by public officials without the knowledge of the beneficiary. In the case at bar the failure to bring suit in time is entirely attributable to the plaintiff beneficiary, and no one else.

Bollinger v. National Fire Insurance Co., 25 Cal. (2d) 399, is not in point for the following reasons:

In the *Bollinger* case the insurance company engaged in a series of acts through its attorneys which were equivocal in character as the result of which the insured was misled to his disadvantage. The court declared in the *Bollinger* case (p. 411):

> "It is sufficient to hold that the equitable considerations that justify relief in this case are applicable whether defendant violated a legal duty in failing to disclose its intention to set up this technical defense, or whether it is now merely seeking the aid of a court in sustaining a plea that would enable it to obtain an unconscionable advantage and enforce a forfeiture."

In the case at bar there is no averment in the complaint which asserts that the plaintiff was misled by any act of the Association or that the Association indulged in any equivocal acts which had a tendency to delay or induce the plaintiff to delay the commencement of an action to enforce his claims as a beneficiary. On the contrary, the Association's letter of refusal to pay any benefits to the plaintiff (Tr. p. 25) politely but firmly and unconditionally expresses "regret" that "*there is no liability on the part of the association*". Certainly, the plaintiff does not claim that he was misled by this advice although there is a suggestion on page 18 of the appellant's opening brief that the letter of denial of liability succeeded in lulling "the plaintiff into a situation whereby the plaintiff waited for a period of eight (8) months and three (3) days before filing his action to enforce the payment of this claim". We will discuss this phase of the matter later in this brief but at this point we assert that there is no evidence in the record to support any claim that the plaintiff was misled by the Association's letter of December 21, 1943, since it was the *only* communication the plaintiff received before he commenced his action belatedly, and he admits in his complaint that the "defendant has refused payment". (Tr. p. 5.)

In the *Bollinger* case, the court reaffirms the rule in support of which it cites many cases to the effect "*that unconditional denial of liability by the insurer after the insured has incurred loss and made claim under the policy gives rise to an immediate right of action*".

Kendall v. Travelers, etc. Association, 169 Pac. Rep. 751, is likewise inapplicable. In that case the court points out

the distinction which counsel for plaintiff overlooks, namely, the period of illness for which weekly payments were sought was a continuing period and the cause of action had not entirely accrued, while in the case at bar the cause of action arising out of the event of death and the unconditional denial of liability had actually accrued for more than eight (8) months prior to the commencement of the action, which, by the terms of the contract, plaintiff was required to bring within six (6) months from the denial of liability. It was with this thought in mind that the court in the *Kendall* case said:

> "In most of these decisions, particularly *Egan v. Oakland Insurance Co.*, the injury for which indemnity was sought had fully passed, as in the Egan case a fire, and the cause of action had entirely accrued, while in the matter before us the claim was yet in the process of development."

Bennett v. Modern Woodmen, 52 Cal. App. 581, is likewise not applicable to the case at bar for the reason that it involved a "peculiar" set of facts. Among these facts was the circumstance that the insured disappeared, and under the provisions of subdivision 26 of section 1963 of Code of Civil Procedure, seven (7) years had to elapse before the presumption of death could be indulged in. It is obvious that if the eighteen (18) months' limitation could be invoked to run from the date of the original disappearance instead of the date when the presumption of death could be indulged in, suit would have been required before the presumption of death, following from the seven (7) years' disappearance, had actually accrued. The court declared itself in favor of the principle contended for by

respondents in this case but refused to apply the principle due to the "peculiar" facts. This is what the court said in the *Bennett* case:

> "It is undoubtedly the general rule that a condition in a policy of insurance providing that no recovery shall be had thereon unless suit be brought within a given time, *is valid if the time limited is, in itself, not unreasonable;* but to permit the defendant *under the peculiar facts of this case,* to successfully interpose the defense of either the provision in the certificate, or of the statute, would be to extend the rule of limitation too far."

(b) Plaintiff claims (App. Op. Br. p. 16) that the Association's letter dated December 21, 1943, was "not a refusal of the defendant to pay the claim" and that the time limitation of six (6) months did not run from its receipt by plaintiff on December 27, 1943. (Tr. p. 20.) The facts before the District Court and in the record do not support appellant's contention.

When the plaintiff filed his complaint on September 1, 1944 (Tr. p. 6), he alleged that the defendant had *"refused payment"*. (Tr. p. 5.) How, when or in what manner the Association "refused payment" did not appear in the complaint. However, in the affidavit of T. G. Hagaman filed in support of the Association's motion for a summary judgment, the facts were alleged by which there was disclosed when and by what means the Association had refused to make payment of the plaintiff's demand. (Tr. p. 19.) In that affidavit it was alleged that "this defendant *refused* to pay the said claim and notified the plaintiff in writing of the *refusal* of the defendant to pay the claim

of plaintiff, and that the plaintiff received said notice of *refusal* of the defendant to pay the same on or about December 27, 1943 and that attached hereto * * * is a full, true and correct copy of the said notice of *refusal*".

The foregoing averment must be taken as admitted for two reasons: first, the plaintiff filed no affidavit controverting the averments set forth in Mr. Hagaman's affidavit; second, plaintiff admittedly declined to amend his complaint although the District Court gave him an opportunity to plead "by way of replication any pertinent facts in avoidance of the time limitation". (Tr. p. 26.)

In effect, appellant is seeking in his brief to introduce by implication an element which might have been predicated upon alleged facts had the plaintiff denied the averments set forth in Mr. Hagaman's affidavit or had the plaintiff filed an amended complaint or a replication as was suggested by the judge of the District Court. There are no such facts in the record.

It has been held that one who declines to amend his pleading when offered an opportunity to do so may not afterward be allowed to treat it as amended when no amendment has in fact been made.

Carpentier v. Brenham, 50 Cal. 549;
21 *Cal. Juris*, sec. 130, p. 188;
Central Credit Creditors' Assn. v. Seeley, 91 Cal. App. 327.

Counsel for appellant, however, make the astounding, irresponsible and unwarranted statement that the Association by its letter of December 21, 1943, lulled "the plaintiff into a situation whereby the plaintiff waited for a

period of eight (8) months and three (3) days before filing his action'' etc. (App. Op. Br. p. 18.) This unfounded statement finds no support in the record.

Appellant's counsel further suggest that the doctrine of equitable estoppel should be invoked against the Association (App. Op. Br. p. 20 et seq.), but they fail to point to any facts which were pleaded in plaintiff's complaint from which the principle of an equitable estoppel would flow.

Certainly, the letter of December 21, 1943, did not assert that the Association was investigating or would investigate the facts. It declared unequivocally that it ''had investigated the facts''. It disclosed that as a result of that investigation it concluded that death was *not* due to ''external, violent and accidental means independent of all other causes'' but that *on the contrary death was ''due to natural causes''*. (Tr. p. 25.) There is no justification for claiming that these are straddling or lulling words. *The plaintiff was not asked to refrain from suing nor taking any means available to him to enforce forthwith any demands he then thought he had.*

Besides, if the plaintiff intended to rely upon an equitable estoppel to relieve him of contractual limitation, he was required to plead the facts to support such claim and to assert the claim itself. This the plaintiff failed to do in his original complaint and he failed to take advantage of the chance to do so by amendment to his complaint or by replication after the trial court gave him the opportunity to do so. (Tr. p. 26.)

The rule is firmly established in California, and in most other jurisdictions, that estoppel must be pleaded affirma-

tively in order to render it available on behalf of the litigant who invokes it. See

Mitchell v. Cheney Slough Irrigation Company, 57 Cal. App. (2d) 138;

Cohen v. Metropolitan Life Ins. Co., 32 Cal. App. (2d) 337.

Since the plaintiff did not either plead or assert an estoppel as against the defendant in the District Court, he cannot contend for such a doctrine on appeal, particularly since the plaintiff had ample opportunity to amend his complaint to invoke the doctrine of estoppel after the trial court rendered its interlocutory order.

Producers Holding Company v. Hill, 201 Cal. 204;

Metcalf v. Guercio, 74 Cal. App. 637.

(c) Appellant claims that the Association's motion for summary judgment was premature because the bar of the claim of the plaintiff did not appear from the face of the complaint and had to be supplied by an affidavit which the Association filed in support of its motion.

This contention is fully and completely answered by the language of the Rules of Civil Procedure which are cited and discussed in subdivision 1 of our argument, *supra.* No further discussion upon this point seems necessary or proper.

F. CONCLUSION.

It is respectfully submitted that the appellant has presented no meritorious reasons for any reversal of the judgment of the District Court, and therefore the judgment should stand affirmed.

Dated, San Francisco,
November 1, 1945.

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AIKINS, WYMAN & SOMMER,
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